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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-253

LEMAR TOWING CO., INC.,
Petitioner

versus

FIREMEN'S FUND INSURANCE COMPANY,
Respondent

OPPOSITION TO PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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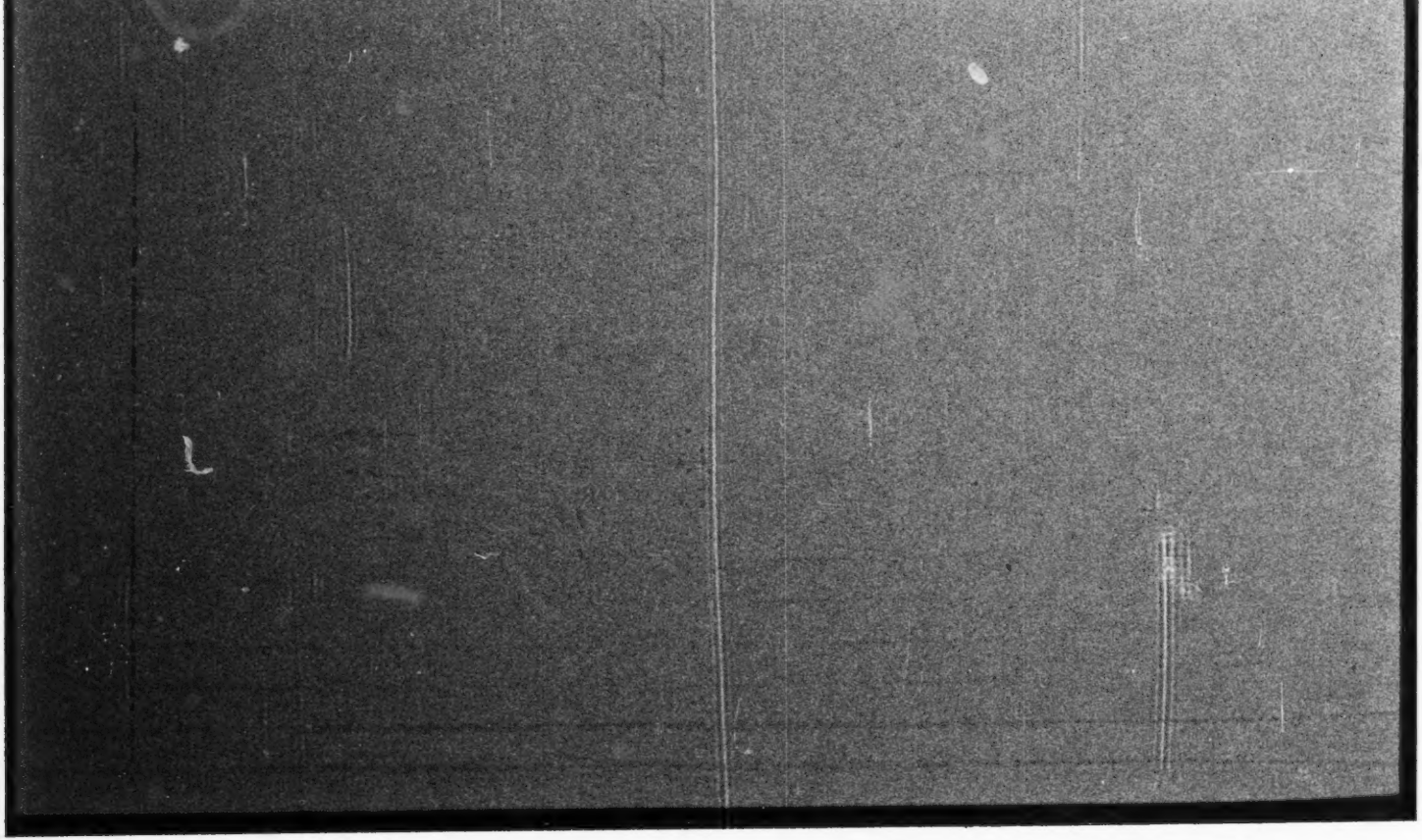

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QUESTION PRESENTED

We are regretfully forced to take sharp issue at the very outset with petitioner's statement of the question presented. As phrased by petitioner, that question has little recognizable resemblance to the facts and the law of this case.

Even a cursory reading of the trial court's opinion, rendered after hearing all the witnesses in person, affirmed by the Fifth Circuit, will quickly make obvious that this is an ordinary, textbook case of marine insurance, in which the district court found as a fact that the loss of the insured vessel was caused, not by a risk

or peril insured by respondent's policy, but by unseaworthiness, specifically incompetence of the captain and crew, to which unseaworthiness the assured petitioner was privy.

Unseaworthiness to which the assured is privy, is not and never has been a risk insured under a marine insurance policy.

The case does not involve any contravention of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 US 310 (1954), does not at all adversely affect, as claimed, "every American time hull policy written without warranties of seaworthiness", and does not in any way whatsoever contravene any state legislation. These "issues" will readily be seen to be artificial "issues" which petitioner, in the enthusiasm of advocacy, seeks to inject into an otherwise quite simple case, a case decided by the courts below on well-established rules of marine insurance law.

The district court found:

> "We conclude that the crew of the TRUDY B, and particularly its captain, was incompetent at the commencement of the voyage thus rendering the vessel unseaworthy at that and subsequent times and that such unseaworthiness proximately resulted from the owner's neglect in failing to determine the qualification and competence of the crew to man the vessel for the intended voyage before its commencement. We further conclude that such unseaworthiness was the proximate cause of the loss of the TRUDY B".

This finding of fact, not "clearly erroneous", but obviously

correct, fully supported by the evidence was adopted by the Court of Appeals in its affirmance (addendum to petition, p.45), and it is submitted, is not open to review in this court.[1]

Nothing in this, purely a factual situation, warrants issuance of a writ.

STATEMENT OF THE CASE

The incredible voyage of this vessel has been related in great detail in the lengthy, carefully prepared opinion of the district judge, and need not be repeated here. The crux of it is that the vessel, already in a damaged condition from a grounding, proceeded down West Pearl River, near the boundary between Louisiana and Mississippi, intending to turn in a westerly direction into the protected waters of the narrow Gulf Intracoastal Canal, bound for New Orleans, to the *west*, for repairs. At the mouth of the West Pearl River, lost in a fog, and because the 21 year old inexperienced captain could not read his compass, the vessel turned to the *east* and proceeded for more than thirty miles in that easterly direction into the relatively rough and open waters of Lake Borgne and the Mississippi Sound. For some seven hours, the vessel was proceeding east, instead of west, and was in open waters instead of the protected waters of the canal. During this entire time the captain was not only ignorant that he was going east instead of west, and even had to ask a passing boat how to get home, but also, as the district court said, he had a "complete lack of knowledge of the waters he traversed".

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[1] *McAllister v. United States*, 348 U.S. 19 (1954).

His vessel sank in the relatively rough and open waters of Mississippi Sound, instead of being in a place of safety, the protected waters of the narrow Gulf Intracoastal Canal or the harbor of New Orleans, 70 or 80 miles away, which she should have reached long since.

ARGUMENT

(a) The McAllister Rule

The law is plain beyond dispute that in order to permit a recovery, it is necessary for the insured to bring his claim for loss within the provisions of the policy and to establish that the loss was caused by one of the perils insured against. *Swan v. The Union Ins. Co.*, 16 US (3 Wheat.) 168 at 170 (1818); to the same effect: *Klein v. Globe & Rudtgers Fire Ins. Co.*, 2 F2d 137 (3rd Cir., 1925); *Rockwood v. Northwestern F & M Ins. Co.*, 26 F2d 824 (EDNY 1928,; *The Wash Gray*, 19 F2d 493 (5th Cir.), reversed on other grounds, 277 US 66 (1928); *The Holly*, 11 F2d 495 (3rd Cir., 1926); *Soelberg v. Western Assurance Co.*, 119 F2d at 31 (9th Cir., 1902).

With the district court finding, as fact, and correctly, that the crew, particularly the captain, was incompetent at the commencement of the voyage, rendering the vessel unseaworthy, that the assured owner, petitioner, was privy to that unseaworthiness, and that the unseaworthiness was the proximate cause of the loss, the loss was not within the coverage provided by the policy. The Circuit Court of Appeals, by affirming, inferentially and correctly adopted these well founded findings of fact under the *McAllister* rule, as not "clearly erroneous".

As we have said, loss by unseaworthiness to which the

assured, as here, is privy, is not and never has been a loss by peril or risk insured by a marine policy.

(b) The Inchmaree Argument

The policy contained the Inchmaree clause, so called because of the name of the vessel in the British case which gave rise to it, *Thames & Mersey Marine Ins. Co. v. Hamilton, Fraser & Co.*, 12 App. Cas. 484 (1887). The clause insures against loss or damage ". . . directly caused by the following: . . . Negligence of Master, Mariners, Engineers, or Pilots; Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them".

The district court found, as fact, that the unseaworthiness of the vessel (incompetent captain and crew), "proximately resulted from the owner's neglect in failing to determine the qualification and competence of the crew to man the vessel for the intended voyage before its commencement". This finding that the unseaworthiness which caused the loss had resulted from the "want of the due diligence" by the assured, the owner, obviously precluded recovery under the Inchmaree clause.

Petitioner's argument on this score singularly ignores the proviso of the clause that the loss "has not resulted from want of due diligence", and ignores the specific finding here that the owner was guilty of neglect with regard to qualification and competence of crew. So, too, is the whole argument which has been confected on the *Sea Pak* (Tropical Marine Prod. v. Birmingham Fire Ins. Co.), 247 F.2d 116 (5 CA 1957) cert. den. 355 U.S. 903 (1957). The argument ignores the vital finding of the

owner's want of due diligence in the instant case, while in *Sea Pak* there was no proof of such want of due diligence. Nothing whatsoever in the *Sea Pak* warrants an argument that where the owner is privy, as here, to the unseaworthiness which causes the loss, the Inchmaree clause could possibly permit recovery.

This whole argument is without merit, as are the unfounded predictions of dire results to flow from the correct holding of the courts below.

ALLEGED INVOLVEMENT OF LOUISIANA LAW

It is abundantly clear that, under the findings of fact of the district court, there can be no recovery under the policy, wholly regardless of any condition or warranty implied by federal maritime law or the effect of Louisiana Revised Statutes 22: 628 upon such a federal rule. Those are artificial "issues", sought to be injected by petitioner, and do not exist in this case. This may explain why the Court of Appeals summarily affirmed the district court without discussion.

The district court also based its conclusion that there was no coverage under the policy, on the long-standing federally established rule that the assured under a policy such as involved herein is under a continuing obligation, implied by law, not knowingly to permit the vessel to break ground in an unseaworthy condition. *Union Insurance Co. v. Smith*, 124 U.S. 405 (1888); *The Sea Pak, supra.* The law of England is the same. Its Marine Insurance Act, 1906, 6 Edw. 7, c41, Section 39 (5) provides:

> "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of

> the adventure, *but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.*" (Emphasis added)

"There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business, . . ." *Queen Ins. Co. v. Globe Ins. Co.*, 263 U.S. 487, 493.

Petitioner seems to claim, nevertheless, that the implied warranty [duty], clearly established under American and British law, is abrogated so far as Louisiana is concerned, by R.S. 22:628. It is doubtful that the legislature of Louisiana would have the power to repeal an established rule of Federal law. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310.

However, it does not appear that the legislature of Louisiana has attempted to do any such thing. R.S. 22:628 is contained in Part XIV of the Louisiana Insurance Code. The first section of that Part, R.S. 22:611, reads in part:

> "§ 611. Scope of Part
>
> The applicable provision of this Part shall apply to insurances other than ocean marine and foreign trade insurances . . ."

The term "ocean marine insurance" is not defined in the Louisiana Insurance Code. Therefore, there being no holding to the contrary by the courts of Louisiana, it is submitted that the term should be given its ordinary meaning. The term is defined in the "Dictionary of Marine Insurance Terms", by Robert H. Brown, 2nd Ed. 1964, Witherly & Co. Ltd., 15 Nicholas Lane, London, E.C. 4, at page 226:

"Ocean Marine Insurance

American expression used to define pure marine insurance on ships, cargoes and allied interests as distinct from inland marine insurance."

Accordingly, under the usual definition of "ocean marine insurance" R.S. 22:628 has no application to insurance on a tug such as involved in the present case.[2] If, notwithstanding, R.S. 22:628 were to be considered as applying to "ocean marine insurance" on tugs, then for it to affect the present case, the phrase "agreement in conflict with, modifying, or extending the coverage" would have to be construed as including judicially established rules with respect to ocean marine insurance, which rules would be invalidated unless printed in the policy. It is to be doubted that this was the intention of the Louisiana legislature.

CONCLUSION

The decision below was based on clearly correct findings of fact, and the correct application of well established rules of law; there was no dissent in the Court of Appeals; the decision does not conflict with any decision of a Court of Appeals for another Circuit, and there has been no show-

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2 The Louisiana Insurance Code has been held applicable to public liabilities insured under an ocean protection and indemnity (not here) policy. This, for the very limited purpose of making applicable the Louisiana Direct Action Statute, which, by its terms, applies to every "policy or contract of liability insurance". (*Coleman v. Jahncke Service*, Inc.) 341 F.2d 956 (CA 5-1965), reh. den., 348 F2d 868, cert. den. and dism., 382 US 967, 974 (1966). The policy involved here is not one of liability insurance, but one insuring against physical loss or damage to the insured vessel. It is of interest and pertinent to the district court opinion below to note that the district court in *Coleman v. Jahncke* (supra) found "the Claribel unseaworthy in having neither a properly calibrated compass nor a crew competent to use one". This finding was affirmed by the Court of Appeals.

ing that a state statute applies to bring about a different result.

The case presents no question warranting certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Respondent's brief has been served by mail upon William Stone, Suite 2120 225 Baronne Street Building, New Orleans, La. 70112 Attorney for Petitioner herein, this 31st day of August, 1973.

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